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9 Trustee in Bankruptcy

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 In re

14 EVANDER FRANK KANE,
15 Debtor.

16 Case No. 21-50028 SLJ
17 Chapter 7
18 Hon. Stephen L. Johnson

19 **OPPOSITION TO DEBTOR'S MOTION
20 FOR STAY PENDING APPEAL OF THE
21 TURNOVER ORDER**

22 Date: November 7, 2023
23 Time: 2:00 p.m.
24 Place: AT&T Connect Teleconference or
25 Zoom Video Conference

26 On September 21, 2023, the Bankruptcy Court entered a turnover order requiring the Debtor,
27 Evander Frank Kane, to deliver to the Trustee the sum of \$170,350 within 21 days of the entry of
28 the order – October 12, 2023 [Docket 313] (“Turnover Order”). On October 3, 2023, the Debtor
filed a Notice of Appeal of the Turnover Order [Docket 319]. The Debtor now seeks a stay of the
Turnover Order pending appeal [Dockets 325-328] (“Motion”).

The Trustee opposes the Motion for a stay pending appeal. To the extent a stay is granted,
the Debtor must be required to deliver a bond or otherwise collateralize the \$170,350 (“Proceeds”)
he has been ordered to turnover to ensure that, if the Court’s order is affirmed on appeal, the estate

1 has the Proceeds in its possession and is not compelled to take action to collect this amount from
2 the Debtor who resides in Canada.¹

3 **I. LEGAL ANALYSIS**

4 In determining whether to grant a stay pending appeal, the Court considers the following:

- 5
6 (1) whether the stay applicant has made a strong showing that he is
likely to succeed on the merits;
7 (2) whether the applicant will be irreparably injured absent a stay;
8 (3) whether issuance of the stay will substantially injure the other
parties interested in the proceeding; and
9 (4) where the public interest lies.

10 *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotations omitted).

11 In evaluating these four factors articulated by the Supreme Court, the first two factors are
12 the most critical. *Id.*

13 **A. Likelihood of Success on the Merits**

14 This first of the two “critical” factors, at least for purposes of a stay, is not necessarily a
15 particularly high bar. Unlike an injunction, the showing for a stay pending appeal does not require
16 the movant to establish that they will win on the merits. *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th
17 Cir. 2012). Among the multiple factors to evaluate likelihood of success on the merits, is whether
18 “serious legal questions are raised.” *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

19 For purposes of the motion, only, the Trustee will concede that the subject of the Turnover
20 Order is somewhat novel. That said, the Trustee submits that the Court’s September 15, 2023 oral
21 ruling is the correct interpretation of applicable state and federal law and that the Debtor is obligated,
22 pursuant to C.C.P. § 704.720(b), to turn over the Proceeds to the Trustee because he failed to timely
23 reinvest them. The Trustee is confident that the District Court will affirm this Court’s ruling on
24 appeal.

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26
27 ¹ It is unclear whether Federal Rule of Civil Procedure 62 applies to an appellant seeking a stay
28 pending appeal in a contested matter. *See, e.g., In re Ewell*, 958 F.2d 276 (9th Cir. 1992), Federal
Rule of Bankruptcy Procedure 9014(c).

1 **B. There is No Evidence of Irreparable Injury**

2 1. The Debtor's Gross Annual Income is \$5,250,000

3 This second "critical" factor is evidence of an irreparable injury. The Motion asserts that the
4 Debtor will "...suffer irreparable injury in the absence of stay. At a minimum compliance with the
5 order during the appeal will be a significant burden to Kane if not irreparable harm." Motion, Page
6 10, Lines 8-10. The Motion, however, provides no evidence of irreparable injury or harm to the
7 Debtor if a stay is not granted.

8 In fact, the exact opposite is true. The Debtor will suffer no harm if a stay is not entered. As
9 made clear in the request for judicial notice filed in support of the Motion, the Debtor's *average*
10 annual gross income through calendar year 2026 is \$5.25 million. *See*, Request for Judicial Notice,
11 Exhibit A, Docket 327. The Turnover Order requires the Debtor to deliver to the Trustee just slightly
12 more than three percent (3%) of his gross annual income. Turning over such a sum is highly unlikely
13 to result in irreparable harm to the Debtor. As to this second of the two critical factors, it is the
14 Debtor who, in seeking the stay, is required to "... demonstrate that irreparable injury is *likely* in the
15 absence of an injunction." *Nken*, 129 S. Ct. at 375 (emphasis in original).

16 In other words, [the moving party's] burden with regard to irreparable
17 harm is higher than it is on the likelihood of success prong, as she
18 must show that an irreparable injury is the more probable or likely
19 outcome.

20 *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

21 Under applicable binding authority in this Circuit, because the Debtor "...has not made a
22 certain threshold showing regarding irreparable harm ...then a stay may not issue, regardless of the
23 petitioner's proof regarding the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th
24 Cir. 2011).

25 2. The Bankruptcy Estate Will Be Harmed If a Stay is Granted Without a Bond

26 While there is no evidence that the Debtor will be harmed if a stay is granted without a bond,
27 the same cannot be said about the bankruptcy estate. The estate is likely to be harmed if the Debtor
28 is granted a stay *without* requiring him to post a bond. The Motion conveniently disregards the

1 Debtor's documented and acknowledged high stakes gambling addiction. *c.f.*, Order Following
2 Trial, *Centennial Bank v. Evander Kane*, Adversary Proceeding 21-5016, Page 3, Lines 13-16. "The
3 testimony at trial demonstrated that Kane has a profound gambling addiction. Kane admits as much,
4 describing his gambling as 'volatile.'"

5 While the Trustee understands that the Debtor may be receiving counseling with regard to
6 his gambling problems, there is no guaranty that the Debtor will not relapse during the pendency of
7 the appeal or somehow no longer be engaged as a professional hockey player and still have the
8 means to return the Proceeds to the Trustee as required by the Turnover Order.

9 In January 2022, the San Jose Sharks placed the Debtor on unconditional waivers for the
10 purpose of terminating his contract, due to the alleged violation of COVID-19 protocols. The
11 Trustee does not know if the Debtor received further compensation from the Sharks. The abrupt end
12 to the Debtor's relationship with the Sharks is a concern to the Trustee, as it is possible for the
13 Debtor to have a dispute with his current team resulting in a loss of income – sums that could be
14 used to pay the Proceeds to the Trustee.

15 Again, because the Debtor has not made a "threshold showing regarding irreparable harm
16 ...then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors."
17 *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

18 **C. Balancing of Hardships**

19 A stay pending appeal will put the estate at risk of not being able to collect the Proceeds
20 from the Debtor. As noted in the prior section concerning irreparable injury, there is no evidence
21 that the Debtor, with an annual gross income of \$5.25 million, will face any hardship in paying the
22 Proceeds to a bonded trustee, or tendering a bond to ensure payment of the Proceeds to the estate
23 while the appeal is pending. On the other hand, the estate will put in the position of potentially not
24 being able to collect the Proceeds in the future if the Debtor ceases playing hockey, if his contract
25 with the Edmonton is terminated, or if he simply gambles it all away.

26 The Proceeds equal roughly 25% of the funds presently on hand in the estate. The Proceeds
27 constitute a material portion of sums of the estate that can be paid to creditors with allowed claims.

28 The Trustee contends that the third factor favors the Trustee.

1 **D. Where the Public Interest Lies**

2 In the Trustee’s opinion, the public interest is not implicated in the motion for the stay or the
3 Trustee’s opposition to it. To the extent that the Court may consider the Debtor’s theory that the
4 public interest lies in getting a published decision on these issues from the District Court, a stay
5 pending an appeal will not make any difference in an opinion from the District Court. The Debtor
6 has filed his appeal and has not presented any evidence that he will not be able to pursue the appeal
7 if a stay is not granted.

8 While not expressly stated in the Motion, the purpose of the Motion is simple – the Debtor,
9 who can currently easily afford to pay \$170,350, does not want to pay now and likely wants to avoid
10 the hassle and embarrassment of having the Trustee take action to collect the Proceeds.

11 **II. CONCLUSION**

12 Because the Debtor has not made a “threshold showing regarding irreparable harm ...” the
13 motion must be denied *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). There is no basis
14 for a stay. The Trustee respectfully requests the Court to deny the Motion.

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16 DATED: October 24, 2023

RINCON LAW LLP

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18 By: /s/ Gregg S. Kleiner

19 GREGG S. KLEINER

20 Counsel for FRED HJELMESET,
21 Trustee in Bankruptcy
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